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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

October Term, 1973.

COCA COLA BOTTLING COMPANY OF NEW YORK, INC.,

Petitioner,

against

CARMINE PALMAROZZO,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

STANLEY ISRAEL,
BLUESTONE, KLIEGMAN & ISRAEL,
Attorney for Petitioner,
Two Park Avenue,
New York, N. Y. 10016
(212) 889-5270.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

COCA-COLA BOTTLING COMPANY OF NEW YORK, Inc.,

Petitioner,

against

CARMINE PALMAROZZO,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

The Petitioner, [The] Coca-Cola Bottling Company of New York, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on December 18, 1973.

Opinions Below.

The opinions of the Court of Appeals and The District Court for the Southern District of New York, both not yet reported, appear in the Appendix hereto.

Jurisdiction.

The judgment of the Court of Appeals for the Second Circuit was entered on December 18, 1973. No petition for rehearing has been made to the Court of Appeals and this petition for certiorari was filed within 90 days from the date of the entry of judgment. This Court's jurisdiction is invoked under 28 U.S.C., Sec. 1254(1).

Question Presented.

Do the provisions of Sections 9 (b) B and (c) of the Universal Military Training and Service Act, 50 U.S.C. Sec. 459, require that the Petitioner, pursuant to its Collective Bargaining Agreement with Teamsters Local 177, pay to Soft Drink Workers Union Local 812 Retirement Fund, the sum of 20 cents per hour for all hours in which the Respondent was in the military service (not to exceed 40 hours per week), so as to enable the Respondent to accumulate sufficient service credits to be eligible for a severance benefit from the said Fund?

Statutory Provisions Involved.

Universal Military Training and Service Act, 50 U.S.C. Sec. 459 (b) (B) and (c), (June 24, 1948, c. 625 Title I, 62 Stat. 614, as amended):

50 U.S.C. Sec. 459 (Sec. 8 of Original Act) in pertinent part, provides:

> "(b) Reemployment rights
>
> In the case of any such person who, in order to perform such training and service, has left or leaves a position (other than a temporary position) in the employ of any employer and who (1) receives such certificate and (2) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—
>
> • • •
>
> (B) If such position was in the employ of a private employer, such person shall—

(i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position by reason of disability sustained during such service but qualified to perform the duties of any other position in the employ of such employer or his successor in interest, be restored by such employer or his successor in interest to such position the duties of which he is qualified to perform as will provide him like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in his case, unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

(c) Service considered as furlough or leave of absence

(1) Any person who is restored to a position in accordance with the provision of paragraph . . . (B) of subsection (b) (of this section) shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

(2) It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph . . . (B) of subsection (b) (of this section) should be so restored in such manner as to give him such status in his employment as he would have enjoyed

if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration of such employment.

(3) Any person who holds a position described in paragraph . . . (B) of subsection (b) (of this section) shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a reserve component of the Armed Forces of the United States.

Statement of the Case.

Respondent worked as an employee of Petitioner from June 4, 1962, until September 21, 1962. He then served six months in the military service and returned to work for Petitioner from March 23, 1963, until June 22, 1967, at which time he voluntarily terminated his employment. At such time he made application for a $200 severance payment, but the same was denied inasmuch as the time spent by him in the military service was not included in determining the service credits required as a condition of such severance payment. Without the inclusion of this time, the minimum requirement of service credits had not been met by him.

Respondent, as well as a number of other persons employed by Petitioner in New Jersey, was a member of Teamsters Local 177. The terms of employment of these persons were largely set forth in a collective bargaining agreement between Petitioner and Local 177. At all times material to this litigation, the said collective bargaining agreement contained the following provision:

"*Article 34 Retirement Fund:* The company shall contribute to the Retirement Fund, for each employee covered by this contract, including tempo-

rary employees and employees on trial period, the sum of 20 cents (twenty) per hour for each hour worked up to 40 (forty) hours a week"

No provision in the collective bargaining agreement dealt with, or in any manner referred to, severance benefits, nor was Petitioner ever a party to any practice involving the granting of such benefits.

In accordance with the above-quoted provision, contributions at the rate of 20 cents per hour were made by Petitioner to the Fund, but only for hours actually worked, not in excess of 40 hours in any given week. Thus, while the collective bargaining agreement provided for a variety of compensable but non-worked hours (vacation time, holidays, sick leave), no contributions to the Fund were made for such hours. Likewise, no contributions to the Fund were made for a laid-off employee or one on leave of absence, although the employment of such an employee was not deemed terminated.

The specific benefits granted by the Fund arose as a result of the adoption by the trustees of the Fund of rules and regulations for the retirement plan (Plan). The Fund is funded by contributions from almost all major soft drink bottlers and distributors in the New York City area and jointly administered by an equal number of union and employer trustees. Under this arrangement, the nature and extent of the benefits granted by the Fund to employees of contributing employers were not and could not be determined by Petitioner.

The Plan provides primarily for pension benefits. It does, however, provide limited severance payment benefits. Article III, Section 1, provides:

> *"Section 1. Severance of Employment before and after January 1, 1964.* If an Employee severs em-

ployment after accumulating five or more years of Service Credits, at least two of which shall have been Future Service Credits, and after attaining age 45, he shall be entitled to the total benefit accrual indicated for the Employee's years of service Credits for Past and Future Service at the time of his severance in accordance with Schedule A, except that this age requirement of 45 shall not apply to severances on and after January 1, 1964."

The $200 severance pay benefit which is the subject of this litigation is thus a feature of the Plan, to be paid by the Fund, and is not a payment created or required by Petitioner's collective bargaining agreement.

Article III, Section 1 conditions payments upon the accumulation of at least 5 years of service credits, which consist of both past and future Service Credits. The amount of the payment is determined by a Schedule which in the instant case would call for the $200 in question.

Service Credits for Future Service (after May 31, 1957) are defined in Article V, Section 3.

> "An Employee shall be granted Service Credits for Future Service for hours actually worked after May 31, 1957 (not exceeding 40 hours per week), in which he is employed in Covered Employment as set forth in the following schedule:

Hours Worked in Covered Employment in a Calendar Year	Service Credit Earned in Calendar Year
1600 or more	1 year
1200 but less than 1600	3/4 year
800 but less than 1200	1/2 year
400 but less than 800	1/4 year
Less than 400	0 year"

It should be noted that Service Credits are accumulated only for hours actually worked, not exceeding 40 hours per week. Additionally, the hours actually worked must be ones in which the individual is "employed in Covered Employment." "Covered Employment" is defined in Article I, Section 7 as follows:

> "'Covered Employment' means employment for which the Employer is obligated by virtue of his collective bargaining agreement with the Union and/or Other Local Unions to contribute to the Retirement Fund and, for purposes of credit, also includes periods of time preceding the date when the Employer became so obligated, as hereafter set forth in Article IV".

The language and intent of the various provisions, when read together, are unambiguous. Accumulation of a specified minimum number of Service Credits is an absolute condition precedent to eligibility for the severance benefit. Accumulation occurs only when an employee actually works a specified number of hours and the employer is obligated by virtue of its collective bargaining agreement to make contributions to the Fund. Lastly, it does not matter whether continued employment is available or not. If the required hours have actually been worked, and the employer is required by its collective bargaining agreement to contribute for those hours, the employee may voluntarily sever his employment to obtain the payment. The payment is in no way conditioned upon the employer's causing the loss of a job and the Plan in no way speaks of compensation for the employee's losing his position with a contributing employer.

In the instant litigation, Petitioner, in accordance with its collective bargaining obligation, made contributions to Fund only for hours actually worked by the Respondent. It did not contribute to the Fund for periods during which

he was on vacation, on a paid holiday, out on sick leave, or temporarily laid off. Likewise, no contributions were made to the Fund for the time spent by him in military service. This was in accord with the provisions of the collective bargaining agreement and constituted an across-the-board application by the Petitioner to all employees of the terms of the collective bargaining agreement. In short, any employee not actually working for Petitioner, in a given hour, would have no contributions made for him and would accumulate no Service Credits. This would be true if the employee had been on layoff, leave of absence, in military service or even if he had been paid for non-worked compensable hours.

Having failed to accumulate the required number of service credits and thus receiving no severance payment from the Fund, Respondent instituted this suit against Petitioner seeking the $200 he would have received from the Fund, had the Petitioner made contribution during such period of time as he was in the Military Service. Jurisdiction was asserted in the District Court for the Southern District of New York, under the Universal Military Training and Service Act, 50 U.S.C., Sec. 459. The District Court granted Respondent's motion for summary judgment, determining that time spent in the Military Service was to be considered in determining whether Respondent accumulated the requisite service credits. The Court of Appeals affirmed with Circuit Judge Friendly dissenting and voting to reverse and dismiss the complaint.

I.

The decision below conflicts in principle with the decision of this Court in *Accardi v. Pennsylvania Railroad Co.*, 383 U. S. 225 (1966).

The issue to be decided in this case turns on whether the severance payment in question is a perquisite of seniority, or rather a benefit within the meaning of Sec. 459 (c) of the Act. If the latter, the Respondent would not be entitled to the benefit, not having met the work condition precedent.

In *Accardi*, the Union and the Employer had negotiated a separation allowance clause to cushion the blow of severe layoffs. While the amount of the allowance was allegedly to be based on the length of "compensated service" of each employee, nevertheless the requirement for a year of compensated service could be met by working one day a month for seven months. This Court pointed out that it would be possible under the collective bargaining agreement for an employee to receive credit for a whole year of compensated service by working a mere seven days and therefore there would be no distinction whatever between a man who worked one day a month for seven months, and a man who worked 365 days in a year. Having emphasized this "bizarre" result, this Court concluded that the allowance was based primarily on the employee's length of service with the employer (a perquisite of seniority). *Accardi* thus requires a close inquiry into whether the benefits in each case are based primarily on the employee's length of service, or on the actual rendering of services by the employee. If the former were the case, a perquisite of seniority would be involved. If the latter were the case "other benefits" would be involved within the meaning of Sec. 459 (c) of the Act, and the veteran would be required to meet the work requirement as a condition of obtaining the bene-

fit. The majority below rejected this case by case analysis and rather interpreted *Accardi* as applying a flat perquisite of seniority rule to all severance benefits. Judge Friendly in his dissent pointed out that the majority had disdained the review required by the Act as construed by *Accardi*. Applying the analysis mandated by *Accardi*, it was his firm conclusion that the severance benefit in the instant case was not a perquisite of seniority but rather "other benefits" based on a real work requirement (which in fact had not been met). It is submitted that had the majority properly interpreted *Accardi* and applied the analysis required therein, a reversal of the District Court and a dismissal of the complaint would have been mandated. It is further submitted that the dissent of Judge Friendly properly applies the rule enunciated in *Accardi* and by so doing reaches the correct determination in this case.

II.

The decision below conflicts in principle with the Decisions of other Courts of Appeal as to the proper interpretation of *Accardi*.

In recent years the decision in *Accardi* has been the subject of a number of decisions and interpretations in the various Circuits.

The 3rd Circuit in *Hoffman v. Bethlehem Steel Corp.*, 477 F. 2d 860 (1973), construed *Accardi* as requiring an analysis of the work requirement in the severance pay case before it. Both the majority and the dissent below acknowledge that the majority rejects that construction.

On December 26, 1973, after the entry of the judgment of affirmance herein, the 3rd Circuit again adhered to the interpretation of *Accardi* which requires a case by case analysis of the work requirements upon which benefits are conditioned. *Foster v. Dravo Corp.*, 72 L. C. Sec. 14, 194.

The 5th Circuit in *Dugger v. Missouri Pacific Railroad Co.*, 403 F. 2d 719 (1968), cert. den. 395 U. S. 907 (1968), and the 10th Circuit in *Kasmeier v. Chicago, Rock Island & Pacific Railroad Co.*, 437 F. 2d 151 (1971), have both held vacation benefits not to be perquisites of seniority where the employees had to satisfy a substantial work requirement before becoming eligible for benefits. Judge Friendly in his dissent, points out that the majority below has rejected the approach of these Circuits and the analysis of *Accardi* made by these Circuits.

While it is respectfully submitted that the 3rd, 5th and 10th Circuits have properly interpreted Accardi, and the result in this litigation would have been different had the matter been heard before any of those Circuits, it should be pointed out that the majority does assert that its approach is consistent with that of the 7th Circuit, *Ewert v. Wrought Washer Mfg. Co.*, 477 F. 2d 128 (1973), and the 9th Circuit, *Locaynia v. American Airlines, Inc.*, 457 F. 2d 1253 (1972), cert. den. 409 U. S. 982 (1973).

Judge Friendly, while not conceding that these decisions do, in fact, undercut the work requirements test, does state that the 8th Circuit in *Morton v. Gulf Mobile & Ohio Railroad Co.*, 405 F. 2d 415 (1969), and the 6th Circuit in *Edwards v. Clinchfield Railroad Co.*, 408 F. 2d 5 (1969), appear to take positions contrary to his and those adopted by the 3rd, 5th and 10th Circuits.

As stated in *Foster v. Dravo, supra,* while it might be possible to distinguish and reconcile some of these decisions on the basis of differences in the terms of the collective bargining agreements, "it is perhaps more candid to concede that a conflict in the Circuits does exist."

This conflict, involving almost all of the Circuit Courts and affecting the interpretation of a major piece of Federal legislation, justifies the granting of certiorari to review the judgment below. Absent the same, the various Courts of Appeal and District Courts, will continue to apply inconsistent and contradictory approaches, resulting in inconsistent and contradictory determinations in the numerous veterans rights cases before them.

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the 2nd Circuit.

Respectfully submitted,

STANLEY ISRAEL,
BLUESTONE, KLIEGMAN & ISRAEL,
Attorney for Petitioner.

APPENDIX.

Judgment of Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of December one thousand nine hundred and seventy-three.

Present:

Hon. Henry J. Friendly,
Hon. Robert P. Anderson,
Hon. William H. Mulligan,
Circuit Judges.

CARMINE PALMAROZZO,

Plaintiff-Appellee,

v.

COCA-COLA BOTTLING COMPANY OF NEW YORK, Inc.,

Defendant-Appellant.

73-1287

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO
Clerk

by VINCENT A. CARLIN
Chief Deputy Clerk

Opinion of Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

No. 21—September Term, 1973.

(Submitted October 10, 1973 Decided December 18, 1973.)

Docket No. 73-1287

CARMINE PALMAROZZO,

Plaintiff-Appellee,

v.

COCA-COLA BOTTLING COMPANY OF NEW YORK, Inc.,

Defendant-Appellant.

Before:

Friendly, Anderson and Mulligan,
Circuit Judges.

Appeal from summary judgment in favor of the plaintiff in the Southern District of New York, Inzer Wyatt, Judge, for the company's failure to credit time spent in military service towards severance pay in violation of 50 U.S.C. §§459(b)(B) and (c).

Judgment affirmed.

Stanley Israel, Esq., Leon L. Sacks, Esq., and Bluestone, Kliegman & Israel, New York, N. Y., on the brief, for Defendant-Appellant.

Paul J. Curran, U. S. Attorney for the Southern District of New York, and Joseph D. Danas, Assistant U. S. Attorney, on the brief, for Plaintiff-Appellee.

ANDERSON, *Circuit Judge:*

Carmine Palmarozzo worked as a permanent employee of the Coca-Cola Bottling Company of New York from June 4, 1962 until September 21, 1962. He then served six months in the Armed Forces and returned to work for Coca-Cola from March 23, 1963 until June 22, 1967, at which time he voluntarily left the company. Coca-Cola employees qualified for severance pay after accumulating five years of service credits, but Palmarozzo was denied severance pay because the company refused to include in its calculation of his service credits the time which he spent in the military. Palmarozzo brought this suit in the Southern District of New York to collect $200 severance pay and to force Coca-Cola to contribute toward his severance pay for the period he spent in the service. He charged that the company, by refusing so to contribute, violated his right as a veteran to be restored in employment with no loss of seniority under the Universal Military Training and Service Act, 5 U.S.C. §§459(b)(B) and (c). (June 24, 1948, c. 625 Title I, 62 Stat. 614, as amended.)[1]

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[1]50 U.S.C. §459 [§8 of original Act] in pertinent part provides:

> "(b) Reemployment rights
>
> In the case of any such person who, in order to perform such training and service, has left or leaves a position (other than a temporary position) in the employ of any employer and who (1) receives such certificate and (2) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—
>
> • • • • • •

Pursuant to a contract with the International Teamsters, Coca-Cola added twenty cents to the Soft Drink Workers Local 812 Retirement Fund for each hour worked up to 40 hours a week. The Rules and Regulations of the Retirement Fund determined the availability of severance benefits, and Article III of those rules stated that if an employee severed employment after accumulating five or more service credits, he was entitled to severance pay.

(footnote continued):

(B) If such position was in the employ of a private employer, such person shall—

(i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position by reason of disability sustained during such service but qualified to perform the duties of any other position in the employ of such employer or his successor in interest, be restored by such employer or his successor in interest to such position the duties of which he is qualified to perform as will provide him like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in his case, unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

(c) Service considered as furlough or leave of absence

(1) Any person who is restored to a position in accordance with the provision of paragraph . . . (B) of subsection (b) (of this section) shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

An employee received ¼ of a service credit for every 400 hours actually worked during a year, but he could never acquire more than one credit per year, representing a total of 1600 hours. The hours actually worked, for purposes of calculating service credits, were determined by Coca-Cola's fund payments, which never exceeded compensation for 40 hours per week. Therefore, an employee received no service credit for overtime during the week or for work in excess of 1600 hours per year.

Employees who worked regularly could easily achieve one service credit each year, and their severance benefits increased with every five service credits—or approximately with every five years of continuous service.

Palmarozzo accumulated 4½ credits during his employment. The District Court found the Act required Coca-Cola to presume for purposes of calculating severance pay that Palmarozzo had been continuously employed while he was in the service, and the court ordered the employer to contribute to the fund for such time.[2] The District Court

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(footnote continued):

> (2) It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph . . . (B) of subsection (b) (of this section) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration of such employment.
>
> (3) Any person who holds a position described in paragraph . . . (B) of subsection (b) (of this section) shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a reserve component of the Armed Forces of the United States.

[2]The lower court opinion was not published.

held the case was governed by *Accardi v. Penn. Ry. Co.*, 383 U. S. 225 (1966), and both parties on appeal agree.

In *Accardi*, the Supreme Court analyzed a "compensated service" plan, similar to the "service credit" plan in this case, and held that denial of credit for time served in the armed forces violated the veteran's right not to lose *seniority*. The Court ordered the Pennsylvania Railroad to base firemen's severance benefits on length of actual service including time spent in fulfilling military obligations. The Court stated:

> "The requirements of the 1940 Act are not satisfied by giving returning veterans seniority in some general abstract sense and then denying them the perquisites and benefits that flow from it. We think it clear that the amount of these allowances is just as much a perquisite of seniority as the more traditional benefits such as work preference and order of lay-off and recall. We hold that the failure to credit petitioners' 'compensated service' time with the period spent in the armed forces does not accord petitioners the right to be reinstated 'without loss of seniority' guaranteed by §§8(b)(B) and (C)." 383 U. S. at 230-31.

Appellant Coca-Cola seeks to limit *Accardi* to severance plans which are based primarily on terms of years with a company rather than work time. Appellant states the "compensated service" plan in *Accardi* was a sham, because credit could be given for any year in which a fireman had worked only one day per month for seven months. Coca-Cola contends the Supreme Court held the plan violated the Act because of the "bizarre result" that a man who only worked seven days a year was preferred over the veteran who worked six full months but could not complete the year due to his military service.

But *Accardi* is not so limited. The "bizarre results" in that case illustrated that the compensated service benefits, despite pretentions to being equated to working time, were actually proportionate to length of service. Similarly, Coca-Cola's plan gave one credit for each year of continuous service, based benefits on five-year plateaus of accumulated credits, and allowed no credit for overtime or work in excess of 1600 hours per year. In both *Accardi* and the present case, length of continuous service, rather than the nature of that service, produced the benefits.

Coca-Cola contends that its service credit plan was sufficiently related to the amount of time actually worked that the benefits were in the nature of compensation, as opposed to a seniority benefit. The Act only requires that the veteran not lose seniority; and the employer is under no obligation to compensate him for time spent in the armed forces. This argument was presented in *Accardi*, and the Supreme Court disposed of it as follows:

> ". . . the *real nature* of these payments was compensation for loss of jobs. And the cost to an employee of losing his job is not measured by how much work he did in the past—*no matter how calculated*—but by the rights and benefits he forfeits by giving up his job. Among employees who worked at the same jobs in the same craft and class the number and value of the rights and benefits increase in proportion to the amount of seniority, and it is only natural that those with the most seniority should receive the highest allowances since they were giving up more rights and benefits than those with less seniority." 383 U.S. at 230. (Emphasis added.)

The Supreme Court, therefore, recognized that the "real nature" of severance benefits which accrue with years of service was not compensation no matter how the benefits

were calculated, but rather was payment for loss of seniority rights acquired over years of employment. The Court perceived that it would be inconsistent to protect seniority rights without guaranteeing the veteran that payment for loss of those rights was also protected. Such severance benefits have become a major form of security from lay-offs and new technologies for employees in mass production industries. Max S. Wortman, Jr., George C. Witterfeld, *Labor Relations and Collective Bargaining*, (1969), 228, 256. To these employees, the benefits represent an offset against losses of preference in lay-offs, automatic wage increases and promotion possibilities. *Bradley v. General Motors Corporation*, 283 F. Supp. 481, 482 (E.D. Mo. 1968). The Act protects the veteran from loss of all these seniority preferences and rights, and as the Court held in *Accardi*, the Act also guarantees that those rights, as accumulated by the veteran and expressed in severance benefits, will have the same value to him as they would have to someone who was not absent because of military service to the country.[3]

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[3]Such a guarantee does not create a *per se* rule applying to any and all compensation termed "severance pay" or to any and all payments upon termination of service. *Accardi* demands that courts look through "false labels", whether "service credit" or "severance pay", and determine if the benefits primarily relate to length of service. 383 U. S. at 230.

Consequently, any lump sum payment which does not increase in size with length of employment—regardless of whether it is labeled a "severance benefit"—is not a perquisite of seniority within the meaning of §§ 459(b) and (c). Such payments might aid an employee to find a new job or acquire new skills, and if the increment or the existence of the payments does not depend on years of service, the Act does not protect them for the veteran. At the same time, if the severance benefits do increase with length of continuous employment, the real nature of the payments is compensation for forfeited seniority rights. 383 U. S. at 230.

The seniority status of the employee in military service has been analogized to that of a person riding an escalator; although not actually continuing his civilian employment, he rises to the same seniority level he would have reached because he stays on the step he occupied when he was employed. *Fishgold v. Sullivan Drydock Corp.*, 328 U. S. 275 (1946). In relationship to employee seniority and severance pay, one court has stated:

> "The 'escalator principle' can mean only this: the escalator had steps both up (continued employment and possible promotion), and out (discharge in exchange for severance pay) • • • [I]t was impermissible • • • to restructure it so as to leave him the steps up, and remove those leading out." *Taylor v. So. Pac. Co.*, 308 F. Supp. 606, 610 (N.D. Cal. 1969).

Coca-Cola's contention that the service credit plan is compensatory, or produces benefits which are not perquisites of seniority, is an attempt to remove these severance payments from the seniority escalator because, under the rules and regulations of the fund, they do not flow automatically from length of employment.

Coca-Cola asks that this court examine the plan in the same manner as the Supreme Court looked for "bizarre results" in the compensated service plan in *Accardi*. If the benefits are not proportionate to hours actually worked, Coca-Cola concedes the plan is a sham, but if the benefits are proportionate, Coca-Cola asks the court to declare that the plan is a legitimate work requirement and not related to seniority, and thus, not in violation of the Act. *Seattle Star v. Randolph*, 168 F. 2d 274 (9 Cir. 1948).

This would be the same approach this circuit took in *Siaskiewicz v. General Electric Co.*, 166 F. 2d 463 (2 Cir. 1948). General Electric denied veterans vacations because

the employment contract required the employees actually work six months during the preceding year to qualify for vacation time. The court held this practice did not violate the Act, as the benefits were contingent on actual work requirements, not seniority, even though the employees would have worked the previous year but for their military service. After *Accardi* and the Supreme Court's subsequent *per curiam* holding in *Eagar v. Magna Copper Co.*, 389 U. S. 323 (1967), to the effect that a similar denial of vacations was illegal under the Act, the validity of the work requirements test in *Siaskiewicz* has been severely challenged. *Ewert v. Wrought Washer Mfg. Co.*, 477 F. 2d 128 (7 Cir. 1973); *Locaynia v. American Airlines, Inc.*, 457 F. 2d 1253 (9 Cir. 1972), *cert. den.* 409 U. S. 982 (1973); *but see Kasmeier v. Chic., Rock Is. & Pac. R. Co.*, 437 F. 2d 151 (10 Cir. 1971).

Nonetheless, commentators have asked that courts not interpret *Accardi* as a flat rule for all severance benefits which increase with length of employment, but rather utilize the "sham" or work requirements analysis as each severance plan is reviewed. Thomas R. Haggard, Veteran's Reemployment Rights and the "Escalator Principle", 51 B. U. L. Rev. 539 (1971). Some courts have followed this approach. *Hoffman v. Bethlehem Steel Corp.*, 477 F. 2d 860 (3 Cir. 1973).[4]

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[4]Even if Coca-Cola's "service credit" plan were analyzed as it requests, the plan could not be considered a legitimate work requirement. The denial of any credit for overtime and the failure of the company to credit any hours in excess of 1600 per year show that this is a plan rewarding a continuous relationship with the company, rather than giving compensation for work actually performed. Also, the exact correlation between service credits and years of continuous employment as well as the increase in benefits with every five credits, or every five years, emphasize that the purported work requirements are just a crude means of measuring rewards for longevity.

Yet such a case-by-case review of the various calculations of severance benefits based upon period of employment, already held in *Accardi* to be perquisites of seniority, would give no firm assurance to veteran employees that they are protected, would cause unnecessary confusion as to what is a legitimate work requirement, and would ultimately defeat the purpose of the Act by delegating to private parties the public trust established for the veteran.

Employees should be able to rely on receiving severance pay based on seniority, including time served in the military forces. This expectation should not turn on whether severance benefits are calculated in the union contract according to hours actually worked or length of service, because the "real nature" of the benefit is payment for loss of accumulated seniority rights, which are determined on the basis of length of service including military service.

The Supreme Court has stated that for purposes of calculating seniority rights, a man in the military is presumed to be "continuously employed," regardless of any possibilities of sickness, lay-off, and other economic uncertainties. *Brooks v. Missouri Pac. R. Co.*, 376 U. S. 182 (1964). The employee-plaintiffs in *Accardi* expected that seniority for purposes of calculating rights was the same as seniority for the purpose of calculating the value of those rights; they did not know they were parties to a "sham" compensated service plan, and it seems very doubtful that any of them actually received credit for working seven days out of a year. 80 Harv. L. Rev. 142, at 149 (1966). Similarly, veterans under the Coca-Cola plan could not have foreseen whether this plan was a sham or not, but they knew that their seniority rights as defined by the Act automatically included time spent in the military and should have had the assurance that severance

pay, as the measure of those rights, was based on the same period of time.[5]

Since the passage of the Act, veterans have had to turn to the Supreme Court for definition of rights of seniority. *Fishgold, supra, Oakley v. Louisville & N. R. Co.*, 338 U. S. 278 (1949); *Diehl v. Lehigh Valley R. Co.*, 348 U. S. 960 (1955), *Tilton v. Missouri P. R. Co.*, 376 U. S. 169 (1964). While contracts between employers and employees have been consulted by the Court to define "seniority" in general terms, the rule for interpreting individual contracts once a benefit has been determined to be a perquisite of seniority has always been:

> "The legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need • • • And no practice of employers or agreements between employers and unions can cut down the service adjusted benefits which Congress has secured the veteran under the Act." *Fishgold*, 328 U. S. at 285.

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[5]Employee reliance on the protected value of seniority rights will be weakened if courts apply a work requirements test to each contract. *Hoffman v. Bethlehem Steel Corporation*, 335 F. Supp. 968 (W.D. Penn. 1972), is an example of the danger to employee expectations inherent in this approach. In its appeals brief Coca-Cola referred to this lower court opinion as "squarely on point." Hoffman, a veteran, sought credit for military time under a Supplemental Unemployment Benefits Plan (SUB), which awarded ½ credit for every 40 hours actually worked. SUB benefits were based on the number of SUB credits received. The lower court held that this was a legitimate work requirement and denied the veteran recovery. After Coca-Cola had submitted its brief on appeal, the Third Circuit reversed the lower court because 40-hour weeks were defined by the contract as any week in which an employee worked one hour; the Court of Appeals held the SUB plan was, therefore, a sham and granted the veteran recovery. *Hoffman v. Bethlehem Steel Corp.*, 477 F. 2d 860 (3 Cir. 1973). Retreating from its contention that the case is "on point", appellant now asks the court to just follow the analysis pursued by the Third Circuit.

If a benefit is a perquisite of seniority, the purpose of the Act—to establish and protect the seniority rights of veterans—is defeated if lower courts allow collective bargaining agreements to redefine a benefit simply by making it contingent on work time rather than seniority.

The Act was premised on the recognition that the man in the military is not represented at the bargaining table and that any special status accorded veterans is an inconvenience to union and management alike. Veterans' Reemployment Rights Under Selective Service Interpretations, 54 Yale L. J. 417 (1945). To say that severance benefits accruing with years of service are protected under the Act as perquisites of seniority as the Court said in *Accardi* and then to make those rights contingent on the extent to which the union contract incorporates work requirements as a condition for receipt of benefits would render the Act entirely nugatory.

This is because any perquisite of seniority can be based upon actual work hours, rather than length of employment. "Seniority provisions give rise to more problems in their application than most other provisions of the contract" in large part because arbitrators are not in agreement as to whether seniority means length of continuous service or actual working presence. Russell A. Smith, Leroy S. Merrifeld, Donald P. Rothchild, Collective Bargaining and Labor Arbitration (1970) 421. To incorporate this confusion into the Act would greatly endanger the security guaranteed the veteran.

Similar attempt by unions and employers to make wage advances contingent on actual work time rather than length of service, have been voided as illegal under the Act. *Blair v. Page Aircraft Maintenance, Inc.,* 336 F. Supp. 1011 (M.D. Ala. 1971), reversed on other grounds, 467 F. 2d 815 (5 Cir. 1972); *Moe v. Eastern Air Lines,* 246 F. 2d 215 (5 Cir. 1957). There is no reason to suppose that promotion or lay-off preferences could be contingent on work requirements, rather than length of service, with-

out violating the Act. The same considerations of fairness to the employed veteran which invalidate attempts to remove wages or lay-offs from the traditional seniority framework also prevent work requirements from providing justification for not crediting veterans military time toward the qualifying employment period for severance pay.

Work requirements could be a justification for not according the veteran deferred compensation or profit-sharing which he might have received if he had not been in the military. Similarly, work requirements could be relevant in deciding whether pension rights are related to seniority or whether a certain skill has been learned, *Tilton v. Missouri & Pac. R. Co., supra,* but none of these circumstances is presented here.[6] The veteran has a right to be credited with time spent in the service of his country.

Such a right does not favor the veteran over the nonveteran or grant him any superseniority. *Fishgold, supra.* Rather, the right expresses the real nature of severance pay which is based essentially on employment for a particular period of time as inherently a part of seniority and guarantees equal competitive status.

Coca-Cola has also asked this court to rule that the severance benefits are "other benefits" within the meaning of §8(c) of the original Act, §459(c), and, therefore, the veteran is only entitled to be treated as if he were on furlough or leave. This request ignores the holding in *Accardi* that the real nature of these severance bene-

[6]Whether the Act protects pension rights or deferred compensation plans is not decided here, and no position on the issue is intimated. See 80 Harv. L. Rev. 142, at 149 (1966). When such benefits are analyzed, the extent to which the payments compensate for work performed, rather than for loss of seniority rights, will determine the real nature of the benefits within the meaning of the Act, and in this respect, correlation between the amount received and actual work requirements may be relevant.

fits is payment in lieu of lost rights accumulated through seniority and also overlooks the disposal of the same statutory argument for the compensated service plan. This circuit had held in *Accardi v. Penn. R. Co.*, 341 F. 2d 72 (2 Cir. 1965), that severance benefits were "other benefits" and not subject to the escalator principle, but the Supreme Court reversed and said, "Without attempting in this case to determine the exact scope of this provision of §8(c) it is enough to say that we consider that it was intended to add certain protections to the veteran and not to take away those which are granted him by §8(b) (B) and the other clauses of §8(c)." 383 U. S. at 232. Under this reasoning, the "other benefits" clause must be viewed as a separate addition to the seniority provisions of the Act and can no longer be used as a basis for defining and limiting the perquisites of seniority. 80 Harv. L. Rev. 142, at 148 (1966).

The judgment of the court below is affirmed.

FRIENDLY, *Circuit Judge* (dissenting):

Agreeing that this case is governed by the principles set out in *Accardi v. Pennsylvania Railroad Co.*, 383 U. S. 225 (1966), I dissent from the conclusion that *Accardi* requires us to hold that the severance benefit here at issue is a perquisite of seniority. If it is not that but rather one of the "other benefits offered by the employer relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces," Palmarozzo must lose, since it is agreed that time on furlough or leave of absence did not qualify for the severance payments.

The union and the railroad in *Accardi* had negotiated the severance payments to cushion the blow of a severe cutback in employment. Under the arrangement, any fireman with less than 20 years seniority was discharged,

while those with 20 years or more were given the option of staying on. Those discharged or opting to quit were awarded severance pay, based upon the amount of "compensated service" they had accumulated with the railroad. The Court noted that the "compensated service" scheme was rather "bizarre," 383 U. S. at 230, in that the requirement for a "year" of compensated service could be met by working one day a month for seven months; this was consistent with the plan's obvious objective to distinguish between old and new firemen. It was thus the details of the plan that led the Court to decide that the allowances were actually based on seniority, not on the total amount of service rendered by the employee. The Court made clear that only because of its determination that the severance payment scheme in *Accardi* was "based primarily on the employees' length of service with the railroad" did it hold the Act applicable. *Accardi* thus requires a close inquiry into whether the benefits in each case are based primarily on the employee's length of service or on the actual total service rendered by the employee; the case-by-case review disdained by the majority is precisely what is required by the statute as construed by the Supreme Court. If Congress had meant that employees entering military service should be treated in all respects on their return precisely as if they had been working all along, its language was singularly inept to express this.

Coca-Cola paid into the union fund 20 cents for every hour worked by each employee. Out of this fund, the union provided employees with several benefits, including pension, death and severance payments. As the majority notes, the union plan premised severance benefits on the number of hours worked per year, awarding one quarter unit of credit for each 400 hours worked up to 1600 hours. Five credits were required to earn a minimum of $200 in severance pay, the amount that Palmarozzo claims is due him here. It is true that this scheme tended to give greater rewards to those who left the job with greater seniority. However, seniority and total compensated work

naturally tend to correlate fairly highly. Even a scheme that scaled severance payments according to the precise number of hours worked would incidentally give greater rewards to employees with higher seniority since they would normally have accumulated more credits. The crucial point is that the scheme in this case is gauged, albeit not with precise exactitude, by the amount of work done, not by the length of service with the company. The plan thus does not constitute a manifestation of seniority sufficient to bring it within §9(b) of the Act, 50 U.S.C. App. §459(b)(B)(i). I would not require that Palmarozzo be credited for work he did not perform.[1]

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[1]The operation of the severance pay plan poses further difficulties to the majority's conclusion which it appears to overlook. Unlike *Accardi*, this case involves a payment made by the union, not the employer. The collective bargaining agreement binds the employer only to pay 20 cents per hour up to 40 hours per week into the union Retirement Fund. The Fund, wholly a union plan, then provides severance payments out of the income from the employer's contributions. While I agree that employers generally should not be permitted to subvert the statute by delegating all fringe benefit payments to the union, this case presents some troubling problems in this regard. The employer's only duty under the statute is to restore the employee to a position of "like seniority, status, and pay." If the collective bargaining agreement had fixed employees' wages at a rate 20 cents per hour higher than here, and the union had increased its dues by the same amount, putting the extra 20 cents into the Retirement Fund, I would not anticipate that the employer would be liable for any deprivation of seniority benefits for returning veterans. The case here does not seem significantly different. The employer's payments into the Fund are clearly based on work actually done, not on seniority, and under the circumstances of this case, he should not be required either to make payments into the fund for hours the employee did not work, or to make payments that the employee claims are due him out of the union's own fund. However, since I conclude that neither the employer's payments nor the union's benefit plan are based on seniority, I do not find it necessary to reach the difficult question of when §9(b) applies to union obligations stemming from or related to a collective bargaining agreement.

The cases cited by the majority do not support its position that the severance benefit in this case is a perquisite of seniority. The most closely analogous recent case, *Hoffman v. Bethlehem Steel Corp.*, 477 F. 2d 860 (3 Cir. 1973), cuts quite the other way. The Third Circuit noted, 477 F. 2d at 863:

> The trial court has properly observed there is a distinction between rights which accrue with the passage of time and those for which some further act is required. Those which accrue with the passage of time are seniority rights which are protected under §9(b). Those for which some other act is required, such as days of work, are not seniority rights protected by §9(b) and would not accrue after the veteran returns.

Although the *Hoffman* court found that the unemployment benefit plan in question was almost as "bizarre" as that in *Accardi* and thus held that the benefits in that case were based on seniority, the court's distinction between rights that accrue with the passage of time and those predicated on some further act by the employee would lead to a reversal here. Most of the courts that have applied §9(b) have employed an analysis similar to that used in *Hoffman*.

It is true that in a *per curiam* decision in *Eagar v. Magma Copper Co.*, 389 U. S. 323 (1967), a divided Court awarded an employee vacation and holiday rights even though, because of military duty, he was not technically employed at the times required for eligibility under the company's rules. In *Eagar*, however, the veteran who had met the work requirements would have been eligible for the benefits if he had simply been on the company's payroll at the relevant times whether he had been working or not. Since *Accardi* had held that the absent employee

must be treated as if he had kept his job continuously throughout the period of his military service, it made sense to hold that Eagar should not be denied a right contingent merely on technical employment throughout the relevant period. In "paid vacation" cases subsequent to *Eagar*, the courts have generally scrutinized vacation eligibility plans to determine whether they turned on seniority or work actually done. Both the Fifth Circuit in *Dugger v. Missouri Pacific Railroad Co.*, 403 F. 2d 719 (5 Cir. 1968), aff'g 276 F. Supp. 496 (S. D. Tex. 1967), cert. denied 395 U. S. 907 (1969), and the Tenth in *Kasmeier v. Chicago, Rock Island & Pacific Railroad Co.*, 437 F. 2d 151 (10 Cir. 1971), have held vacation benefits not to be perquisites of seniority where the employees had to satisfy a substantial work requirement before becoming eligible for the benefits. Upholding a 110-day work requirement as a prerequisite to vacation benefits, the *Kasmeier* court wrote, "Whereas in *Accardi* the compensated service requirement was a mere label to obscure the real nature of the payments, in this controversy the 110-day requirement is not a mere facade to veil the true nature of the benefits; it is a legitimate, uniformly applied condition precedent to vacation benefits." 437 F. 2d at 154. In *Ewart v. Wrought Washer Mfg. Co.*, 477 F. 2d 128, 129 (7 Cir. 1973), the Seventh Circuit upheld a veteran's vacation claim, but suggested that a different result might follow if the vacation rights were "purely additional compensation for services actually rendered." Similarly, in *Hollman v. Pratt & Whitney Aircraft*, 435 F. 2d 983, 988-89 (5 Cir. 1970), the court made it clear that vacation rights would be granted to veterans only if "they would automatically accrue . . . but for induction." See also *Tuttle v. U. S. Plywood Corp.*, 293 F. Supp. 401 (D. Ore. 1968); *Connett v. Automatic Electric Co.*, 323 F. Supp.

1373 (N. D. Ill. 1971; *Fees v. Bethlehem Steel Corp.*, 335 F. Supp. 487 (W. D. Pa. 1971).[2]

In any event, the "paid vacation" cases are distinguishable from the case at bar. In virtually all of those cases, the "work requirement" prerequisite being granted vacation rights was expressed in terms of a minimum number of days on the job.[3] Such a requirement is close to the requirement, as in *Eagar*, that the employees be "on the payroll" for a specified period prior to the vacation or holiday in order to be entitled to paid time off. In this

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[2]The Eighth Circuit, in *Morton v. Gulf, Mobile & Ohio Railroad Co.*, 405 F. 2d 415 (8 Cir. 1969), and the Sixth Circuit in *Edwards v. Clinchfield Railroad Co.*, 408 F. 2d 5 (6 Cir. 1969), *aff'g* 278 F. Supp. 751 (E.D. Tenn. 1967), appear to be to the contrary. See also *Salek v. Great Northern Ry.*, 277 F. Supp. 936 (D. Minn. 1967); *Barry v. Smith*, 285 F. Supp. 801 (D. Mass. 1968); *cf. Messina v. Consolidated Freightways Corp.*, 315 F. Supp. 340 (W.D.N.Y. 1970).

The majority cites the Ninth Circuit's brief opinion in *Locaynia v. American Airlines, Inc.*, 457 F. 2d 1253 (9 Cir.), *cert. denied*, 409 U. S. 982 (1972), as undercutting the work requirements test for vacation benefits. I do not read that opinion so broadly. The vacation plan at issue in *Locaynia* premised eligibility on periods of "continuous service" with the company, much like the plan in *Eagar*. The court directed its attention to the "narrow issue" of whether "*this* vacation pay [was] a perquisite of seniority." 457 F. 2d at 1255 (emphasis added). Nothing in the opinion indicates that the court would hold that a veteran was entitled to vacation pay if the plan in question contained a *bona fide* work requirement. A district court in the same circuit has recently read *Locaynia* as limited to vacation plans not including a work requirement. *Young v. Southern Pacific Trans. Co.*, 84 L.R.R.M. 2546 (C.D. Cal. Sept. 19, 1973).

[3]The only post-*Eagar* "paid vacation" case I have been able to find in which there was a work requirement expressed in total number of hours of compensated service is *Tuttle v. U. S. Plywood Corp., supra*, 293 F. Supp. 401. The court there held that the work requirement took the vacation benefit out of the scope of §9(b).

case, however, the work requirement amounted to much more than a requirement that the employee be technically on the payroll. The entire operation of the compensation plan depended upon a rough equivalence between the employer's contribution for employee hours worked and the credits earned by the employee for working those hours. The work requirement was no sham; on the contrary, it was central to the operation of the severance benefit scheme.

In analyzing employee benefits of other kinds, courts have uniformly inquired whether the benefits are awarded merely for tenure, or are intended as compensation for acquired expertise or work actually performed. It is only when an employer has provided automatic promotions or pay increases to his employees on the basis of length of service rather than work that the courts have held the employer must restore the veteran at a pay or job level that he would have attained if he had continued in the company's employment during the period of his military service. *Hattan v. Tabard Press Corp.*, 406 F. 2d 593 (2 Cir. 1969); *Power v. Northern Illinois Gas Co.*, 388 F. 2d 427 (7 Cir. 1968); *Wienberg v. United States*, 425 F. 2d 1244 (Ct. Cl. 1970); *Wood v. Southern Pac. Co.*, 447 F. 2d 486 (9 Cir. 1971). Courts have used the same analysis for absence allowance credits, *Bradley v. General Motors Corp.*, 283 F. Supp. 481 (E. D. Mo. 1968); pension eligibility, *Litwicki v. PPG Indus.*, 84 L.R.R.M. 2538 W. L. Pa. Sept. 19, 1973); and general welfare benefits, *Gentile v. United States Trucking Corp.*, 355 F. Supp. 906 (S.D.N.Y. 1973). See Haggard, *Veterans' Reemployment Rights and the "Escalator Principle,"* 51 B. U. L. Rev. 571 (1971). The decision here seems counter to the strong current of authority.

Finally, the majority relies on the "escalator" metaphor, which has been employed extensively in construing the

"seniority, status and pay" language of §9(b). This principle is that if the passage of time would automatically have elevated the employee to a higher level, the veteran is entitled to assume that level upon his return; in Mr. Justice Douglas' language, the veteran "does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 284-85 (1946). But when the employer or the union in good faith conditions benefits on performance rather than mere tenure, it is not required to place the veteran in a position he could only have obtained through his own work as an employee. The escalator metaphor does not fit such cases; rather the employer should not be required to put the veteran in a position he could have obtained only by climbing up the stairs.

I would reverse the judgment of the district court and direct it to dismiss the complaint.

Judgment of District Court for the Southern District.

UNITED STATES DISTRICT COURT,

SOTHERN DISTRICT OF NEW YORK.

CARMEN PALMABOZZO,

Plaintiff,

against

THE COCA-COLA BOTTLING COMPANY OF NEW YORK, Inc.,

Defendant.

Each of the parties having moved this Court for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and oral argument on behalf of each party having been heard by the Hon. Inzer B. Wyatt on September 1, 1972, and the Court having rendered its written opinion on October 18, 1972, granting plaintiff's motion for summary judgment, it is hereby

ORDERED, ADJUDGED AND DECREED that defendant, The Coca-Cola Bottling Company of New York, Inc. shall pay to plaintiff, Carmen Palmarazzo the sum of $200.00 as and for severance benefits otherwise payable and in lieu of payment by the Retirement Fund.

Dated, New York, January 5, 1972.

INZER B. WYATT
United States District Judge

Consented to:

Whitney North Seymour, Jr.,
United States Attorney for the Southern
District of New York
Attorney for Plaintiff
By Joseph D. Danas

Opinion of District Court for the Southern District of New York.

UNITED STATES DISTRICT COURT,

SOTHERN DISTRICT OF NEW YORK.

CARMEN PALMAROZZO,

Plaintiff,

v.

THE COCA-COLA BOTTLING COMPANY OF NEW YORK, Inc.,

Defendant.

Appearances:

Whitney North Seymour, Jr., Esq., United States Attorney, Attorney for Plaintiff, United States Courthouse, New York, New York 10007, Joseph D. Danas, Esq., Assistant United States Attorney of Counsel.

Bluestone, Kliegman & Israel, Esqs., Attorneys for Defendant, Two Park Avenue, New York, New York 10016, Leon L. Sacks, Esq., Stanley Israel, Esq., of Counsel.

WYATT, District Judge:

This is a motion by plaintiff for summary judgment in his favor. Fed. R. Civ. P. 56. The defendant has also moved for summary judgment. There is no genuine issue of material fact. (It should be noted that, contrary to proper practice, the facts for plaintiff are presented in a memorandum of law rather than in an affidavit; they are not denied by defendant.) Judgment should be entered in favor of plaintiff but not necessarily for the kind of relief demanded in the complaint.

1.

The action is by a former employee of defendant (Cola) and is brought for severance pay of $200 under 50 App. U. S. C. §459 (b) (B), a part of the Universal Military Training and Service Act (June 24, 1948, c. 625, Title I, 62 Stat. 614 as amended; "the Act"). The same provision was contained in substance in the earlier Selective Training and Service Act of 1940 (54 Stat. 890). The relevant parts of the section provide that a person who leaves a position with a private employer to perform military training and service and who satisfactorily completes such training and service, must be "restored" to his position "or to a position of like seniority, status, and pay (50 App. U. S. C. §459 [b] [B] [i]). A further provision is entitled "Service considered as furlough or leave of absence," states that a person "restored to a position • • •

> shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration."

And further states:

> "It is declared to be the sense of the Congress that any person who is restored to a position • • • should be so restored in such manner as to give him such status in his employment as

> he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment. (50 App. U. S. C. §459 [c] [1] and [2])

A further provision gives this Court jurisdiction of proceedings to enforce rights under the Act and directs the United States Attorney, "if satisfied" etc., to appear as attorney for the person seeking to enforce his rights (50 App. U. S. C. §459 [d]). In the case at bar, the United States Attorney so appears.

2.

Plaintiff (Carmen) was employed by Cola, apparently in New Jersey although Cola has its principal place of business in this District. Carmen was employed by Cola from June 4, 1962 to September 21, 1962 on which date he left his position to perform military training and service. He appears to have been inducted into the armed forces and to have satisfactorily completed his service on March 11, 1963. Thereafter, he was "restored" to his position by Cola on March 23, 1963. He worked in that position until June 22, 1967 when he voluntarily left the employ of Cola and was not given any severance pay.

The issue, as posed by the parties, is whether Carmen is entitled to a severance payment of $200 from Cola.

A collective bargaining agreement between Local 177, International Teamsters, and Cola was in effect at all times during Carmen's employment. Article 34 of that Agreement is entitled "Retirement Fund" and reads as follows:

> "The Company shall contribute to the Retirement Fund, for each employee covered by this

> contract, including temporary employees and employees on trial period, the sum of 20¢ (twenty cents) per hour *for each hour worked up to 40 (forty)* hours a week."

It is without dispute that Carmen was "covered" by the contract with Local 177. That contract obligated Cola to contribute to the "Retirement Fund"—which is not otherwise described, but which concededly refers to "Soft Drink Workers Local 812 Retirement Fund" which was established under an Agreement and Declaration of Trust, dated April 25, 1957. Local 812 is affiliated with International Teamsters and apparently its Retirement Fund is available to other Teamster Locals, like Local 177, whose collective bargaining agreement requires the employer to contribute to that Fund. Evidently, there are a number of employers who contribute to the Fund because of provisions in their collective bargaining agreement; the employer who has such an agreement with Local 812 is one; defendant Cola, having such an agreement with Local 177, is another; how many other employers contribute does not appear.

It should be noted that the agreement between Local 177 and Cola does not do more than require Cola to contribute "for each hour worked". (There is nothing about the benefits to the Cola employees; there is nothing about any severance pay.)

3.

The severance pay benefits are provided for in the "Rules and Regulations for the Retirement Plan of the Soft Drink Workers Union Local 812 Retirement Fund". These Rules (hereafter usually "Rules") were adopted by the Trustees of the Retirement Fund. These trustees are said to be "an equal number of union (Local 812) and employer trustees" (Israel affidavit, pp. 2-3).

Thus, whether Carmen is entitled to severance pay is determined by the Rules of the Fund trustees. Cola did not make these Rules and for all that appears had nothing to do with their adoption nor with their interpretation, past or present.

The Rules in Article III provide for severance pay if a covered employee (such as Carmen) "severs employment after accumulating five or more years of Service Credits, at least two of which shall have been Future Service Credits".

In Article IV of the Rules, it is provided how employees accumulate Service Credits. They are of two sorts; (1) for Past Service and (2) for Future Service. Past Service Credits relate only to periods of employment before June 1, 1957; since Carmen did not work for Cola in that period, Past Service Credits can be disregarded as to him.

Service Credits for Future Service relate to employment after June 1, 1957; thus, all of Carmen's service credits will be Future Service Credits. Such Credits, according to the Rules (p. 22), are "granted" for "hours actually worked" in a calendar year as follows:

Hours	Service Credit Earned
1600 or more	1 Year
1200 but less than 1600	¾ Year
800 but less than 1200	½ Year
400 but less than 800	¼ Year
Less than 400	0

The Rules have provisions relating to "Military Service". This is defined in Article I, Section 10 (p. 17) and is recognized as affecting Past Service Credits in Article IV, Section 2 (p. 22). With respect to Carmen's situation, the Rules provided (Article IV, Section 4 [p. 23]) that, whereas failure to earn one year of Future

Service Credits in two consecutive calendar years, is a break in employment which cancels all prior such credits, in the case of an employee in military service, the time so spent is allowed as a "grace period" and presumably avoids cancellation of the prior Future Service Credits of the employee in military service.

The amount of the severance pay depends on the years of Past and Future Service Credits accumulated (five years being minimum) and (inapplicable in Carmen's case) the combination of the number of Past and the number of Future Service Credits accumulated. See Schedule A to the Rules.

It does not appear from the Rules of otherwise how the Trustees determine the "hours actually worked" by an employee. It can only be assumed, and I do assume, that the Trustees base their determination on the number of hours for which the employer has made a contribution to the Fund. In this connection, it will have been noted that the agreement between Cola and Local 177 required a contribution "for each hour worked" whereas the language of the Rules is "each hour actually worked"; this difference is not believed significant for the issue here.

4.

Carmen left the employ of Cola on June 22, 1967. What happened between him and the Fund does not appear, but it is without dispute that he was not given any severance pay.

It is also without dispute that Cola made no contribution to the Fund for the time Carmen was away for military service.

The memorandum of law for Carmen states that he had accumulated 4-1/2 years of Service Credits by the time he left employment on June 22, 1967; that this was

1/2 year short of the minimum 5 years of credits required for severance pay; that he had worked in 1962 for 584 hours (and Cola presumably contributed for these hours); and that he had worked in 1963 (after his return from military service) for 1,136 hours (and Cola presumably contributed for these hours). These statements are not disputed.

It can be seen that if Cola contributed to the Fund for the period while Carmen was in military service, he would have accumulated five credits and would have been entitled to severance pay.

On 584 hours worked in 1962, he accumulated 1/4 year credit; had he worked 800 hours he would have accumulated 1/2 year credit or an increase of 1/4. The difference between 800 hours and 584 hours is 216 hours. He was away in military service for 13 weeks and 4 days in 1962; had he remained in Cola's employ he woud easily have worked at least 216 hours.

On 1136 hours worked in 1962, he accumulated 1/2 year credit; had he worked 1200 hours he would have accumulated 3/4 years credit or an increase of 1/4. The difference between 1200 hours and 1136 hours is 64 hours. He was away in military service for 12 weeks in 1963; had he remained in Cola's employ he would easily have worked at least 64 hours.

The memorandum of law for Carmen states that had Cola contributed to the Fund for the period of his military service, he "would have been eligible for the minimum severance payment of $200.00 from the Retirement Fund". This appears to be true and is not disputed by Cola.

The Trustees of the Fund must have determined that, on the basis of contributions made by Cola, Carmen had accumulated only 4-1/2 years of Service Credits and therefore was not entitled to severance pay.

5.

The question is finally reached: does the Act require Cola to contribute to the Fund for Carmen for the period of his military service? It seems to be clear that it does; (at the least, it requires that Cola contribute for Carmen for a number of hours sufficient for him to accumulate the same Service Credits under the Rules of the Fund as he would have accumulated had he remained in the employ of Cola instead of performing his military service.)

This conclusion is based on the language of the Act that the returning veteran be "restored without loss of seniority". It has been held "the amount of these (separation) allowances is just as much a perquisite of seniority as the more traditional benefits such as work preference and order of lay-off and recall". *Accardi v. Pennsylvania Ry. Co.*, 388 U. S. 225, 230 (1966). The case cited arose under a predeceasor to the Act but the provisions were the same, or substantially the same, as are now in the Act. In the case cited, the amount of "separation allowances", which is the same as severance pay, "was determined, according to the agreement, by the length of 'compensated service' with the railroad" (383 U. S. at 227-28). The Supreme Court ruled that "restored" veterans are entitled to credit for the full amount of time served in the armed forces in calculating their severance pay" (383 U. S. at 233).

The Supreme Court had earlier said that a "restored" veteran "does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war". *Fishgold v. Sullivan Corp.*, 328 U. S. 275, 284-85 (1946) In the same opinion, the Supreme Court declared that his service in the armed services is counted as service in the plant so

that he does not lose ground by reason of his absence" (328 U. S. at 285).

In passing the Selective Service Act of 1948 (62 Stat. 614) which, after amendments, is now the Act, Congress added to the earlier legislation what is now 50 App. U. S. C. §459 (c) (2) declaring the "sense of Congress" and already cited hereinabove. In so doing, Congress must have meant to legislate into law the words quoted above from the *Fishgold* opinion. The Senate Report (No 1268) refers in this connection to the "escalator principle". 1948 U. S. Code Cong. Service pp. 1989, 2004.

Under the law and the cited decision and opinion of the Supreme Court, Carmen is entitled to have Cola contribute to the Fund for him for such number of hours in the period of his military service as would enable him to accumulate the same Service Credits under the Rules as he would have accumulated had he remained continuously in the employ of Cola. Had Cola made such contribution, Carmen would have been entitled to $200 from the Trustees when he left his employment with Cola on June 22, 1967.

6.

The conclusion reached does not mean that Cola should have contributed to the Fund for its employees during the period they were in military service; during this period, no one could tell whether or when they would be "restored" to their positions. No contribution would ever be required except for those employees who were in fact "restored".

The conclusion reached does not mean that contribution is required for every employee who is "restored"; contribution is required in respect of a "restored" employee only when contribution would make a difference in the benefits payable to the employee under the Rules. For example, assume that a "restored" employee had

2 years of Future Service Credit while in military service, and left the employ of Cola after earning 1 more year of Future Service Credit. In such a case, even if Cola made the contribution for the period of military service, this would make no difference to the "restored" veteran because he would not in any event have the minimum of 5 years of Service Credits.

Thus the application of the Act depends on the situation of each individual employee.

In the case of Carmen, the failure of Cola to contribute has the effect of depriving him of $200 in severance pay.

7.

The form of the judgment is left to resolution by the parties, if that be possible.

In theory, Carmen is entitled to a direction that Cola contribute to the Fund as above specified. He would then appear to be entitled to a payment of $200 from the Fund. The Trustees, however, are not parties to this action; if Cola made the contribution now, the Court has no way of compelling the Trustees to pay him the $200.

Having failed to see that contributions for a past period were made when Carmen was "restored", Cola was in violation of the Act and, under the facts here, this caused damage to Carmen of $200 for which he is entitled to judgment.

The motion of defendant for summary judgment is denied. The motion of plaintiff for summary judgment is granted.

Settle judgment on notice.

Dated: New York, New York
October 18, 1972

INZER B. WYATT
United States District Judge